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Contracts--Pledges--Adequate Public Notice of Sale Required, Despite Waiver, Where Essential to Good Faith (Matter of Kiamie, 309 N.Y. 325 (1955))

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to legal proceedings for the same relief.[17] Under this expanded view of what constitutes state action, the ultimate effect on the grantor would be the same whether the device chosen is a restrictive covenant, as in the *Shelley* case, or an automatic reverter clause, as in the present case. In both instances, whether the person is a grantor with a possibility of reverter or a covenantee, he will be left with an empty right, impossible of enforcement.

If the courts intend to strictly enforce the fourteenth amendment insofar as discriminatory racial provisions are concerned, *Shelley v. Kraemer* should not be confined, as in the instant case, to restrictive racial covenants, but should be recognized as establishing a constitutional principle. Complete clarification, however, can be achieved only when the present distinction between "valid" and "enforceable" is eliminated, and such discriminatory conditions are definitely declared to be illegal. Such action would preclude the possibility of a recurrence of the peculiar results reached in the instant case.

CONTRACTS — PLEDGES — ADEQUATE PUBLIC NOTICE OF SALE REQUIRED, DESPITE WAIVER, WHERE ESSENTIAL TO GOOD FAITH. — Plaintiff-executor instituted a discovery proceeding to ascertain whether defendant converted certain stock which had been pledged to secure a promissory note made by the testator. The contract of pledge contained a provision authorizing public or private sale on default, waiving any advertisement. Defendant-pledgee bought in the stock at public auction held pursuant to an advertisement which set forth only the names and number of shares of stocks offered. In answer to plaintiff's allegation that such notice of sale was inadequate, defendant pleaded the waiver. The Court *held* that notwithstanding testator's waiver, the pledgee was still obliged to give detailed notice of sale since such was essential to good faith. *Matter of Kiamie,* 309 N.Y. 325, 130 N.E.2d 745 (1955).

The relation between pledgor and pledgee has traditionally been regarded as one of trust [1] and at early common law the pledgor was accorded a considerable amount of protection. For example, the

[17] "In order that the actor may be entitled as against the other to the immediate possession of the land, it is necessary that he have a right to possession which he can enforce against the other by legal proceedings appropriate for the recovery of the possession of land." RESTATEMENT, TORTS § 90, comment *a* (1934).

[1] See Lord v. Hartford, 175 Mass. 320, 56 N.E. 609 (1900); Persons v. Russell, 212 Ala. 506, 103 So. 543, 545 (1925) (dictum); Hudgens v. Chamberlain, 161 Cal. 710, 120 Pac. 422, 424 (1911) (dictum).

pledge could be sold only under judicial proceeding,[2] notice to the pledgor was mandatory[3] and the pledgee was ineligible to purchase at his own sale.[4] Business necessity has wrought modifications. Judicial sale is no longer obligatory[5] and the contract may authorize a purchase by the pledgee,[6] or a waiver of notice to the pledgor.[7]

The view that the pledgee is under a duty to act in good faith is generally recognized[8] and is endorsed by the Restatement.[9] Courts, however, have been reluctant to indicate the precise obligations imposed by such duty, and hence the standard has remained flexible. Nevertheless, various courts have suggested some criteria by which good faith may be determined. For example, it has been stated that a pledgee must demand payment from the pledgor prior to sale;[10] that the pledgee must exert a reasonable effort to obtain a fair price;[11] and that where the property is readily saleable on the open market a private sale might amount to a conversion.[12] In accordance with the requirements of good faith, it has been held that where there is a public auction sale, notice must be given to the public, notwithstanding waiver by the pledgor of notice to himself.[13] The courts are generally in agreement that effective public notice must at least indicate the time and place of the sale.[14] However, there is little harmony as to

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[2] Wilson v. Little, 1 Sandf. 351, 357 (N.Y. Super. Ct. 1848) (dictum), *aff'd*, 2 N.Y. 443 (1849); Smith v. Shippers' Oil Co., 120 La. 640, 45 So. 533, 539 (1907) (dictum).

[3] Lewis v. Graham, 4 Abb. Pr. 106 (N.Y.C.P. 1857); Brown v. Ward, 3 Duer 660, 663 (N.Y. Super. Ct. 1854) (dictum); see III STORY, EQUITY JURISPRUDENCE § 1381 (14th ed. 1918).

[4] Parker v. Vose, 45 Me. 54 (1858); Lord v. Hartford, *supra* note 1; Middlesex Bank v. Minot, 45 Mass. (4 Met.) 325 (1842) (per curiam); Maryland Fire Ins. Co. v. Dalrymple, 25 Md. 242, 267 (1866) (dictum). *But see* Fidelity Ins. Co. v. Roanoke Iron Co., 81 Fed. 439, 450 (C.C.W.D. Va. 1896).

[5] See Wheeler v. Newbould, 16 N.Y. 392 (1857); III STORY, EQUITY JURISPRUDENCE § 1381 (14th ed. 1918).

[6] Hiscock v. Varick Bank, 206 U.S. 28 (1907); Dibert v. Wernicke, 214 Fed. 673, 680 (6th Cir. 1914) (dictum); Hudgens v. Chamberlain, 161 Cal. 710, 120 Pac. 422, 423 (1911) (dictum); Farmers' Nat'l Bank v. Venner, 192 Mass. 531, 78 N.E. 540, 542 (1906) (dictum).

[7] See Smith v. Craig, 211 N.Y. 456, 105 N.E. 798 (1914); Glidden v. Mechanics' Nat'l Bank, 53 Ohio St. 588, 42 N.E. 995 (1895); Atlantic Nat'l Bank v. Korrick, 29 Ariz. 468, 242 Pac. 1009, 1010 (1926) (dictum).

[8] See Hudgens v. Chamberlain, *supra* note 6; Eppert v. Lowish, 91 Ind. App. 231, 168 N.E. 616 (1929); Jennings v. Moore, 189 Mass. 197, 75 N.E. 214 (1905); *cf.* Dibert v. Wernicke, *supra* note 6 at 680 (dictum).

[9] RESTATEMENT, SECURITY § 49 (1941).

[10] See Paine v. Jersey Central Power & Light Co., 12 N.J. Misc. 739, 174 Atl. 495, 496 (Sup. Ct. 1934) (dictum).

[11] See, *e.g.*, Penn Mut. Life Ins. Co. v. Bancroft, 207 Ala. 617, 93 So. 566 (1922).

[12] Southern Exchange Bank v. Langston, 33 Ga. App. 477, 127 S.E. 230, 232 (1925) (dictum).

[13] Hagan v. Continental Nat'l Bank, 182 Mo. 319, 81 S.E. 171 (1904); Laclede Nat'l Bank v. Richardson, 156 Mo. 270, 56 S.W. 1117 (1900).

[14] See, *e.g.*, Union & Mercantile Trust Co. v. Harnwell, 158 Ark. 295.

whether further elements need be included, such as description, identity of the pledgee, and designation of the item sold as a "pledge." [15]

Some jurisdictions have imposed statutory requirements as to notice of sale, especially with respect to time.[16] Although New York statutes do not contain specific provisions covering the sale of a pledge, there is some authority for the proposition that Section 202 of the Lien Law [17] is applicable to such a sale.[18] This section provides for a minimum of fifteen days notice of sale and that such notice shall set forth the name of the owner, a description of the property, and the time and place of the sale. It appears, however, that the provisions of the Lien Law may be waived.[19] The parties to a contract of pledge may make any agreement in regard to sale,[20] provided the underlying requirement of good faith is not abridged.[21]

In the instant case the Court asserted that fulfillment of the pledgee's duty of good faith to the pledgor would involve detailed public notice and held that the notice actually given was not sufficiently detailed, since the stock sold was little known and not listed on the Exchange.[22] In imposing an obligation on the pledgee flowing not from the contract but from the relationship, the Court has taken a position which may be regarded as an outgrowth of the liberality and

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250 S.W. 321 (1923); Lowe v. Ozmun, 3 Cal. App. 387, 86 Pac. 729 (1906); Hagan v. Continental Nat'l Bank, *supra* note 13.

[15] One writer has suggested the following additional requisite elements: (1) the owner's name; (2) the name of the pledgee; and (3) the amount due on the pledge. See Seasongood, *Drastic Pledge Agreements,* 29 HARV. L. REV. 277, 282 (1916).

[16] See, *e.g.,* ALA. CODE ANN. tit. 9, § 12 (1940); ARIZ. CODE ANN. § 62-530 (Supp. 1954); CAL. CIV. PROC. CODE ANN. § 692 (West 1954); MICH. STAT. ANN. §§ 19.411, 19.412 (1937); S.C. CODE § 45-164 (1952).

[17] The applicable portion is as follows: "Each sale of personal property to satisfy a lien thereon shall be at public auction to the highest bidder, and shall be held in the city or town where the lien was acquired. . . . [N]otice of such sale, describing the property to be sold, and stating the name of the owner or person for whose account the same is then held and the time and place of such sale, shall be published once a week, for two consecutive weeks, in a newspaper published in the town or city where such sale is to be held, and such sale shall be held not less than fifteen days from the first publication; if there be no newspaper published in such town, such notice shall be posted at least ten days before such sale in not less than six conspicuous places therein." N.Y. LIEN LAW § 202.

[18] See, *e.g.,* Jones v. National Chautauqua County Bank, 272 App. Div. 521, 74 N.Y.S.2d 498 (4th Dep't 1947); Gandy v. Collins, 160 App. Div. 525, 146 N.Y. Supp. 89 (2d Dep't 1914), *rev'd on other grounds,* 214 N.Y. 293, 108 N.E. 415 (1915); Jacobs v. National Bank, 208 Misc. 923, 13 N.Y.S.2d 60 (Sup. Ct. 1939).

[19] See, *e.g.,* Fullerton v. National Bank, 184 App. Div. 37, 171 N.Y. Supp. 547 (1st Dep't 1918).

[20] See Phillips v. Bank of Athens Trust Co., 202 Misc. 698, 119 N.Y.S.2d 47 (Sup. Ct. 1952).

[21] *Cf.* Toplitz v. Bauer, 161 N.Y. 325, 55 N.E. 1059 (1900).

[22] The notice set forth the names of the corporations, the number of shares and the time and place of the sale, but nothing further.

flexibility of earlier holdings in protecting the rights of the pledgor.[23] That justice was served by the holding is not doubted. However, the general problem of what constitutes adequate public notice still remains. It is submitted that a workable solution would be to amend the Lien Law so that its provisions would unmistakably apply to pledge agreements, and could not be waived by the pledgor.

INJUNCTION—SUIT BY WIFE TO ENJOIN MEXICAN DIVORCE ACTION DISALLOWED.—Defendant-husband instituted a divorce action in Mexico while on a one-day visit there. Plaintiff-wife sought an injunction restraining her husband from maintaining the action, alleging that the defendant had not established bona fide domicile in Mexico. The Court of Appeals *held,*[1] on motion to dismiss, that as the Mexican divorce would be invalid, there would be an adequate remedy in declaratory judgment. *Rosenbaum v. Rosenbaum,* 309 N.Y. 371, 130 N.E.2d 902 (1955).

The Constitution reserves to the states control over marriage and divorce.[2] This, coupled with the jurisdictional problems peculiar to divorce actions, led to confusion as to the recognition of sister-state decrees.[3] Eventually most states [4] recognized divorces of other states where jurisdiction was founded on the domicile of one party and service by publication of the defendant.[5] A line of Supreme Court decisions clarified the law in this area by stating that a wife may establish separate domicile whenever necessary and proper; [6] that where neither party is domiciled a divorce decree is invalid; [7] that every state must give full faith and credit to divorce decrees of sister states based on

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[23] See, *e.g.,* Toplitz v. Bauer, *supra* note 21; Wheeler v. Newbould, 16 N.Y. 392 (1857); Cole v. Manufacturers Trust Co., 164 Misc. 741, 299 N.Y. Supp. 418 (Sup. Ct. 1937).

[1] The Court split 4-3 in reversing the Appellate Division. Rosenbaum v. Rosenbaum, 285 App. Div. 427, 138 N.Y.S.2d 885 (1st Dep't 1955).

[2] U.S. CONST. amend. X (by implication); *In re* Burrus, 136 U.S. 586, 593-94 (1890) (dictum); see 40 IOWA L. REV. 667, 669 (1955).

[3] 2 KENT, COMMENTARIES *108.

[4] See, *e.g.,* Thompson v. State, 28 Ala. 12 (1856); *In re* James' Estate, 99 Cal. 374, 33 Pac. 1122 (1893); Dunham v. Dunham, 162 Ill. 589, 44 N.E. 841 (1896); Gould v. Crow, 57 Mo. 200 (1874); Shafer v. Bushnell, 24 Wis. 372 (1869).

[5] Some states excepted to this rule. See, *e.g.,* People v. Baker, 76 N.Y. 78 (1879); Irby v. Wilson, 21 N.C. 568 (1837); McCreery v. Davis, 44 S.C. 195, 22 S.E. 178 (1895).

[6] Cheever v. Wilson, 76 U.S. (9 Wall.) 108 (1869).

[7] Bell v. Bell, 181 U.S. 175, 177 (1901) (dictum); Streitwolf v. Streitwolf, 181 U.S. 179, 183 (1901) (dictum). See also RESTATEMENT, CONFLICT OF LAWS § 111 (1934).